



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

JUN 28 1985

OFFICE OF ENFORCEMENT
AND COMPLIANCE
MONITORING

MEMORANDUM

SUBJECT: Guidance on Complying with the Notification
Requirements on Section 113(a)(1) and 113(a)(4)
of the Clean Air Act

FROM: Courtney M. Price *Courtney M. Price*
Assistant Administrator for Enforcement
and Compliance Monitoring

TO: Regional Counsels
Regions I-X

Air Management Division Directors
Regions I, III, V, IX

Air & Waste Management Division Directors
Regions II and VI

Air, Pesticides & Toxics Management Division Director
Region IV

Air & Toxics Division Directors
Regions VII, VIII and X

This memorandum provides you with guidance on implementing the notification provisions contained in Sections 113(a)(1) and 113(a)(4) of the Clean Air Act. It is intended to emphasize the requirement of Section 113(a)(4) to issue, in the case of corporations, a copy of the notification to the "appropriate corporate officers." The guidance recommends procedures for issuing notices of violation under Section 113(a)(1) and for implementing the copying provision in Section 113(a)(4).

The notice provisions in Section 113 are general in nature, giving EPA a great deal of latitude. This guidance is, therefore, not intended to set inflexible standards, but rather to suggest practices that might encourage expeditious resolution of violations and to suggest practices that might avoid challenges to enforcement actions based on alleged notice deficiencies. Thus, although the recommendations are based upon an analysis of existing law in this area, the specific procedures suggested

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are not necessarily compelled by the Act or judicial decisions. By recommending specific procedures this guidance is not meant to imply the existence of jurisdictional or due process limitations on EPA's enforcement authority. This guidance does not address issues regarding EPA's enforcement discretion once an NOV has been issued.

Summary

This guidance recommends that the notification requirements of Section 113(a)(1) be met by the issuance of a written notice of violation (NOV), and that the NOV be sent to the highest ranking officer or employee at the violating facility known to EPA. It recommends that the notice copying requirement of Section 113(a)(4) be met by sending copies of the NOV to specified corporate officers, or in the case of a foreign corporation (i.e., one not incorporated in the state), by sending the notice to the registered agent of record and preferably also to appropriate officers in the corporate headquarters. The guidance clarifies that issuance of an NOV should not be delayed because of difficulties in implementing the Section 113(a)(4) copying procedures. The guidance recommends that the NOV specify the State implementation plan (SIP) provision(s) violated, advise the source of the opportunity to confer with EPA, describe the emission points in violation, and indicate by a "cc." notation that copies of the NOV were sent to the State, and, in the case of a corporation, to appropriate officers.

I. Effect of the Notice

A. Section 113(a)(1) Notice

Section 113(a)(1) of the Clean Air Act (CAA or the Act), 42 U.S.C. §7410(a)(1), requires EPA to notify any person found by the Administrator to be in violation of a SIP. Specifically, Section 113(a)(1) provides:

Whenever, on the basis of any information available to him, the Administrator finds that any person is in violation of any requirement of an applicable implementation plan, the Administrator shall notify the person in violation of the plan and the State in which the plan applies of such finding. [emphasis added]

EPA has interpreted the mandatory requirement to give notice as triggered only after a discretionary finding has been made by the Administrator that a violation exists. The courts have upheld the Agency's interpretation. City of Seabrook v. Costle, 659 F.2d 1371, 1374 (5th Cir. 1981) [obligation to make a finding not mandatory]; see, Wisconsin Environmental Decade, Inc. v. Wisconsin Power and Light Co., 395 F.Supp. 313, 317-320 (W.D. Wis. 1975); West Penn Power Co. v. Train, 522 F.2d 302 (3d Cir. 1975); United

States v. Lehigh Portland Cement Co., C.A. No. 84-3030, slip opinion at 6 n.4 (N.D. Iowa December 12, 1984) [Order Denying Defendant's Motion to Dismiss] (Attachment 1); United States v. Chevron, C.A. No. EP-80-CA-265, slip opinion at 3 (W.D. Tex. June 10, 1983) [Order Denying Defendant's Motion to Dismiss or for Abstention] (Attachment 2).

Notification under Section 113(a)(1) is referenced in Section 113(b)(2), which provides in relevant part that:

The Administrator shall in the case of any person which is the owner or operator of a major stationary source, and may, in the case of any other person, commence a civil action . . . whenever such person --
...

(2) violates any requirement of an applicable implementation plan . . . (B) more than 30 days after having been notified by the Administrator under subsection (a)(1) that such person is violating such requirement[.] [emphasis added]

Notice is also referenced in Sections 113(a) and 113(d) (relating to the issuance of administrative orders), and Section 113(c)(1)(A) (relating to the initiation of a criminal action). Issuance of a notice and the lapse of 30 days is not, however, always required prior to the initiation of an action to address SIP violations. See 42 U.S.C. §7603 [Emergency Powers]; see also, 42 U.S.C. §7413(b)(3) [Section 112(e) (NESHAPs) and Section 111(e) (NSPS) violations].

B. Section 113(a)(4) Notice

Section 113(a)(4) of the Clean Air Act, 42 U.S.C. §7413(a)(4), requires in the case of a corporate violator that copies of the Section 113(a)(1) notice "be issued to appropriate corporate officers." The issue of whether the 113(a)(4) notice copying requirement is a jurisdictional prerequisite to a Section 113(b)(2) civil action was raised by the defendant in United States v. Lehigh Portland Cement Co., *supra* (Attachment 1). In Lehigh the defendant sought a dismissal arguing that EPA's NOV was insufficient in that it was served only on the plant manager who, defendant argued, is not an "appropriate corporate officer" within the meaning of Section 113(a)(4). In support of its argument defendant cited 40 C.F.R. §122.22, "Signatories to CWA NPDES Permit Applications," which defines the term "responsible corporate officers" in part as a president, secretary or treasurer.

The Court in Lehigh found the CWA regulation inapposite, and denied defendant's Motion to Dismiss holding that a plant manager is an appropriate corporate officer within the meaning of Section 113(a)(4). In addition the Court stated in dicta that the

Section 113(a)(4) notice copying requirement was not a jurisdictional prerequisite to a civil action pursuant to Section 113(b)(2).

II. Recommended NOV Procedures

A. Written Notice

There is case law supporting the position that the Section 113(a)(1) notice requirement can be met where a source has received substantial or constructive notice from EPA of a violation. Nevertheless, as a general practice the Regions should issue written notices. Moreover, when read together, Sections 113(a)(1) and 113(a)(4) imply that the notification should be issued in writing in the case of corporate sources in order to comply with the copying requirement in Section 113(a)(4).^{1/} While substantial or constructive notice may be sufficient, written notice clearly establishes the authority to proceed administratively and provides evidence of when the 30-day period provided for in Sections 113(a)(1) and 113(b)(2) begins to run. This guidance, therefore, recommends that all notices be given in writing in the form of an NOV.

B. Contents of the NOV

The Act requires the Administrator to notify the violator and the State of a finding of violation of any requirement of a SIP. What a finding consists of and what degree of specificity might be required in the notice is unclear,^{2/} but the language of the Act suggests that at a minimum EPA should identify

^{1/} Written notice of a violation is not explicitly required by Section 113(a)(1). Cf., Sections 126(a)(1) [Interstate pollution abatement], 161(b)(1)(B) [State notice to redesignate PSD areas].

^{2/} EPA has promulgated regulations at 40 C.F.R §54.3(b), that specify in detail the contents required for citizen suit notices. Specifically, the regulations require that the notice include:

sufficient information to permit the recipient [i.e., the Administrator, the State and the alleged violator] to identify the specific standard, limitation, or order which has allegedly been violated, the activity alleged to be in violation, the person or persons responsible for the alleged violation, the location of the alleged violation, the date or dates of such violation, and the full name and address of the person giving the notice.

It is recommended that this provision be used as guidance in drafting NOVs. This degree of detail is, however, not required for EPA notices, but applies only to citizen suit notices. This

the violated provision(s) of the SIP. The legislative history on Section 113(a)(1) is no more specific.

Some indication of what should be contained in an NOV can be gleaned from the purpose of the Section 113 notice requirement. The Third Circuit Court of Appeals discussing this issue stated that the notice requirement is intended to "make the recipient aware that the 'definitive' regulations are not being met and to trigger the statutory mechanism for informal accommodation which precedes any formal enforcement measures." West Penn Power Co. v. Train, 522 D.2d 302, 311 (3d Cir. 1975). Thus, in addition to citing the SIP provision violated, the NOV should afford the source an opportunity to confer if an administrative order is contemplated.^{3/}

In addition, it is recommended that the notice describe the emission points in violation of the SIP standard. Such information might assist the source in responding to the NOV and coming into compliance expeditiously. The notice need not, however, describe the violation with specificity. Requiring a complex

(footnote 2 continued)

is due to the unique purposes citizen suit notices are intended to serve. Specifically, Congress intended the citizen suit provision of the Clean Air Act to provide a limited waiver of sovereign immunity. Moreover, since citizen suits might force EPA to act, the notice requirement was intended to be strictly construed in order to ensure the opportunity of Agency resolution prior to the commencement of litigation. NRDC v. Train, 510 F.2d 692 700, 724 (D.C. Cir. 1974), as modified (1975); People of the State of California v. Dept. of the Navy, 431 F.Supp. 1271, 1278 (N.D. Cal. 1977); City of Highland Park v. Train, 519 F.2d 681, 690 (7th Cir. 1975); NRDC v. Callaway, 524 F.2d 79, 84 n.4 (2d Cir. 1975).

^{3/} The Act does not require that an opportunity to confer be given before the Agency can initiate an enforcement action pursuant to Section 113(b)(2). An opportunity to confer is only required under Section 113(a)(4) before an administrative order can take effect. A statement in the NOV offering an opportunity to confer fulfills the Section 113(a)(4) prerequisite, even if the administrative order is not issued until after a conference takes place. Nor is the opportunity to confer restricted to the 30-day period after the notice has been given. Holding the conference earlier rather than later is, however, to the advantage of EPA since such meetings often facilitate EPA's ability to obtain information as well as early resolution of the violation. Some Regions include a statement in their NOVs limiting the opportunity to confer to a specified number of days, e.g. 10 days of receipt of the NOV.

notice would only cause delays in enforcement in contravention of the Congressional intent to expedite enforcement.^{4/}

Finally, in the case of corporate violators, the notice should name the corporate officers who are sent copies of the NOV. This might promote expeditious correction of the violations. It would also help document compliance with Section 113(a)(4). (See discussion below.)

C. Persons Who Should Receive the Notice

Section 113(a)(1) requires that notice be given to any "person" found to be in violation of a SIP. The term "person" is defined broadly in Section 302(e) of the CAA as including "an individual, corporation, partnership, association, State, municipality, political subdivision of a State, and any agency, department, or instrumentality of the United States and any officer, agent or employee thereof." 42 U.S.C. §7602(e) [emphasis added].

The wording of the Act, therefore, implies that a Section 113(a)(1) notice is technically sufficient if it is given to any known officer, agent or employee of the source. See, U.S. v. Lehigh Portland Cement Co., supra (Attachment 1). This is important since, as a practical matter, it may be difficult for EPA to identify the senior executive officer of a source with specificity. It is recommended, however, that NOVs be issued to the highest ranking officer, agent, or employee at the violating facility known to EPA. This will increase the likelihood of the violation being corrected by the source expeditiously.

^{4/} By analogy to the citizen suit notice provision it appears that the courts take a pragmatic approach in ascertaining the sufficiency of a notice. Baughman v. Bradford Coal Co., 471 F.Supp. 488, 490 (W.D. Pa. 1977), aff'd 592 F.2d 215; People of the State of California v. Dept. of the Navy, supra; see Metro-politan Washington Coalition for Clean Air v. District of Columbia, 373 F.2d 1089 (D.C. Cir. 1975), rev'd on other grounds 511 F.2d 809 (D.C. Cir. 1975); Susquehanna Valley Alliance v. Three Mile Island, 619 F.2d 231 (3d Cir. 1980), cert. denied 449 U.S. 1096 (1981); NRDC v. Callaway, supra; but see City of Highland Park v. Train, supra; Massachusetts v. U.S. Veterans Administration, 541 F.2d 119 (1st Cir. 1976). The Court in South Carolina Wildlife Federation v. Alexander, 457 F.Supp. 118 (D.S.C. 1978), indicated that deficiencies in the notice that did not interfere with the purposes of the notice requirement would not bar a citizen suit. 457 F.Supp. at 123. Similarly, in People of the State of California v. Department of the Navy, 431 F.Supp. at 1278, the Court upheld a deficient citizen suit notice since the recipients were effectively informed "of the violations alleged, the standards violated, the locations of the violations, etc."

Similarly, although the requirement in Section 113(a)(4) to issue copies of the notice to appropriate corporate officers is not a jurisdictional prerequisite to a civil action, care should be taken to comply with this requirement. Regions should be able to identify the corporate officers through formal (e.g. Section 114) or informal contacts with the source, by contacting the State environmental agency, by checking corporate directories, or by calling or writing to the State office responsible for corporate registrations. (The State corporate registration office is typically identified in the State corporate code.) In cases involving domestic corporations Regions are urged to send copies of the NOV to the corporate president, to any vice-president identified as responsible for environmental matters, to the general counsel of the corporation, and, in cases where the plant manager is the highest corporate officer, to the registered agent. In the case of a foreign corporation (i.e. one not incorporated in the State), a copy of the NOV should be sent to the registered agent of record at the State corporate registration office, and to any other corporate officers you can identify as suggested above. The original NOV should show a "cc." for all persons copied.

Although the Court in United States v. Lehigh Portland Cement Co., supra, held that the notice copying requirement in Section 113(a)(4) was satisfied in that case by giving the NOV to the plant manager, following the additional steps recommended above may assist in expediting a corporation's response to the NOV. For the same reason the copies of the NOV should ideally be issued to the corporate officers at the same time the NOV is given to the source. Regions should not, however, delay issuing the NOV if you cannot readily identify the appropriate corporate officers.

D. How to send the Notice

Section 113(a)(1) provides that, once the Administrator makes a finding that a violation exists, EPA shall give notice to the person in violation of the plan and to the state. In addition, Section 113(a)(4) requires the Administrator to issue copies of the notice to appropriate corporate officers. The Act does not, however, specify a procedure for issuing the notice.^{5/} Nevertheless, we recommend that NOVs be sent by Certified Mail Return

^{5/} Compare Section 113(a)(2) of the Act which requires "public" notice when the Administrator makes a finding that a State has failed to effectively enforce a SIP. Similarly Section 115(a) requires that the Administrator give States "formal" notices of SIP deficiencies to correct international air pollution. The absence of a public or formal notice requirement in Sections 113(a)(1) and 113(a)(4) of the Act is, therefore, apparently not the result of omission. Nor is personal service of process such

Receipt Requested, to help establish evidence that the notice was given.

III. Conclusion

Please call Rachel Hopp (FTS) 382-2859 for any explanations of this guidance, to discuss issues raised, or if you want additional information or examples.

Attachments

(footnote 5 continued)

as is provided for in Rule 4, Fed.R.Civ.P., required for a notice to comply with Sections 113(a)(1) and 113(a)(4) of the Act. Rule 4 service of the complaint would be required in any event if the Agency initiated a civil action.

ATTACHMENT I

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
CENTRAL DIVISION

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FILED

SEAR RAPIDS HDQTRS OFFICE
NORTHERN DISTRICT OF IOWA

DEC 12 1984

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WILLIAM J. KANAK, Clerk

By As Roemer DEPUTY

NO. C 84-3030

ORDER

RECEIVED

DEC 12 1984

U.S. ATTORNEY
NO. DIS. OF IOWA

UNITED STATES OF AMERICA,
Plaintiff,

vs.

LEHIGH PORTLAND CEMENT
COMPANY,

Defendant.

This matter comes before the Court on defendant's motion to dismiss. A hearing was held on August 9, 1984, in Fort Dodge, Iowa. After carefully considering the briefs and arguments of both parties, this Court denies defendant's motion to dismiss.

This action involves the implementation of the Clean Air Act. Under this Act, a state is to adopt a State Implementation Plan (SIP) which would require the state to satisfy the Act's National Ambient Air Quality Standards (NAAQS). The Act provides for both federal and state enforcement of the SIPs. This action arises from the federal enforcement of the Iowa SIP.

Defendant is a cement manufacturing company with its corporate headquarters in Allentown, Pennsylvania. One of its thirteen plants is located in Mason City, Iowa and is the plant which is the subject of this suit. On March 16, 1983, plaintiff notified the Iowa Department of Environmental Quality and the plant manager of defendant's Mason City plant of violations of SIP fugitive dust regulations. Plaintiff brought this action on

April 4, 1984. Previous to plaintiff's notice, the Iowa Department of Environmental Quality had given notice to defendant of SIP fugitive dust regulations violations and on March 5, 1984, the Department and defendant entered into a consent order concerning the violations.

Defendant's motion to dismiss is directed at plaintiff's first claim for relief (¶¶13-17 of plaintiff's Complaint), which allege fugitive dust violations. Defendant stated in a letter to this Court dated August 27, 1984 that it does not contend that plaintiff's second claim for relief (¶¶18-19 of its Complaint), which alleges violation of new source performance standards, is subject to dismissal.

In its motion to dismiss, defendant presents three arguments. First, defendant claims that the copy of a notice of violation to appropriate corporate officers, required by 42 U.S.C. §7413(a) is a condition precedent to the bringing of an action under 42 U.S.C. §7413(b)(2), and the notice given by plaintiff was defective and constituted insufficient process and insufficient service of process on defendant. Second, defendant claims that the doctrine of abstention applies, and the Court therefore lacks jurisdiction. Finally, defendant argues that the Iowa Department of Environmental Quality's consent order precludes plaintiff from bringing this action because of issue and claim preclusion. Defendant also originally argued that plaintiff lacked standing to bring this action, but conceded this argument at the hearing.

I.

In support of its argument that plaintiff failed to give defendant adequate notice, defendant relies on 42 U.S.C. §7413(a)(4), which states that when there is a corporate violator, a copy of the notice of violation shall be issued to appropriate corporate officers. Defendant argues that because only defendant's Mason City plant manager received notice, and the plant manager is not a corporate officer, plaintiff failed to sufficiently serve defendant notice. In support of its argument, defendant also cites a regulation of plaintiff's¹ that defines "responsible corporate officers" as including only president, vice-president, secretary and treasurer, and prior case law, which has found the failure to give notice of violation a jurisdictional defect in private citizen actions brought under the Clean Air Act.

In response to defendant's argument, plaintiff first states that it complied with the statute by giving notice to the plant manager because there is only a requirement for the EPA to "notify the person in violation" which is found in §7413(a),² and "person"

¹40 C.F.R. §122.22.

²42 U.S.C. §7413(a)(1) states: "Whenever, on the basis of any information available to him, the Administrator finds that any person is in violation of any requirement of an applicable implementation plan, the Administrator shall notify the person in violation of the plan and the State in which the plan applies of such finding. If such violation extends beyond the 30th day after the date of the Administrator's notification, the Administrator may issue an order requiring such person to comply with the requirements of such plan or he may bring a civil action in accordance with subsection (b).

may be any officer, agent, or employee thereof.³ According to plaintiff, subparagraph (a)(4), the section that states a copy the notice of violation shall be issued to a corporate officer is not jurisdictional because §7413(b), which sets out the enforcement procedures, states that the EPA may bring suit against a "person" more than thirty days after being notified under (a)(1) and makes no mention of (a)(4). Secondly, plaintiff claims that even if (a)(4) is a jurisdictional requirement, it has met the requirement of issuing notice to appropriate corporate officers when it gave notice to the Mason City plant manager because the ordinary meaning of a corporate officer includes a plant manager. Thirdly, plaintiff argues that if the Court does not accept the position that a plant manager is a corporate officer, plaintiff satisfied the (a)(4) requirement by issuing a notice of violation to the defendant's corporate headquarters in Pennsylvania on August 2, 1984 (twelve days after this Court held a hearing on this matter), since no prejudice resulted. Finally, plaintiff argues that the cases defendant relies upon in arguing that there was a defective notice are inapplicable because they deal with a different section which involves citizen's suits in which no notice of any kind was given.

It is evident from the arguments presented by both parties that several questions arise when considering the sufficiency of the notice to the defendant. A major question is whether a plant manager is an "appropriate corporate officer" under §7413(a)(4).

³ 42 U.S.C. §7602(e).

If this Court were to find that a plant manager is an "appropriate corporate officer," plaintiff would have satisfied the notice requirements of §7413, since defendant's plant manager did receive a notice of violation. In determining this question, the Court could find no statutory language nor legislative history which excluded a plant manager from the category of "appropriate corporate officers." The Court further notes that the general definition of a (corporate) officer would include a plant manager because an officer is one who holds an office of authority or trust. Websters New Collegiate Dictionary (1979). As the head of the Mason City plant, defendant's manager certainly held a position of authority or trust. With regard to the EPA regulation, which definition of "responsible corporate officer" fails to include plant managers, this Court is unpersuaded such a definition applies here or should exclude a plant manager. First, it was not formulated by Congress but rather by the EPA to be applied to the National Pollutant Discharge Elimination System Program pursuant to the Clean Water Act, which is unrelated to the statutory section in question here. Moreover, its definition is more limited because it defines "responsible" corporate officers as opposed to "appropriate" corporate officers. Although the Court thinks that plaintiff might have been more cautious in issuing a copy of the notice to the "appropriate corporate officers," its service of notice to defendant's Mason City plant manager was sufficient because the plant manager was an "appropriate corporate officer." By finding that plaintiff issued a copy of the notice of violation to an "appropriate corporate officer,"

there is no need to determine the other questions raised by the parties relating to the sufficiency of notice, because they are premised on the assumption that the Mason City plant manager was not a corporate officer.⁴

II.

In its argument that the Court should abstain from hearing this case, the defendant finds the factual situation before this Court to be similar to that of other cases in which courts have abstained. In rejecting defendant's claim, plaintiff relies on the applicable statutory sections, the statute's legislative history, and case law.

In its reading of the statute, which gives both federal and state courts jurisdiction to enforce provisions of a state SIP, this Court finds no limitation on the EPA (or any other federal government agencies) in bringing an action when there is or was already a parallel state proceeding. This Court notes as indicative of Congress' intent to avoid any bars on federal agencies in bringing an action the repeal of a statutory section

⁴Although this Court does not need to decide if the §7413(a)(4) requirement of issuing a copy of a notice of violation to the appropriate corporate officers is a jurisdictional requirement, it notes that in United States v. Chevron, No. 80-80-CA-265 (W.D.Tex. June 10, 1983), the Court found that the only requirements for bringing an action under §7413 were (1) notice to the alleged violator, and (2) a lapse of thirty days. Accordingly, under Chevron, which appears to be the only case to address the §7413 jurisdictional requirements, the (a)(4) requirement is not jurisdictional.

which stated that federal enforcement was permitted only when violations resulted from a state's failure to take responsible grounds to enforce its standards. Air Quality Act of 1967, 81 Stat. 453, 493. The case law also supports plaintiff's position. In United States v. Chevron, No. ^E81-80-CA-265 (W.D.Tex. June 10, 198³), the District Court of the Western District of Texas ruled against defendant's motion to abstain from hearing the case due to the pendency in state court of a prior lawsuit involving similar issues. The Court found that since there did not exist a situation where (1) a constitutional issue might be mooted or placed in a different posture by a state court decision as to the applicable state law, (2) a federal court's exercise of jurisdiction would substantially interfere with the state's effort to enforce a system of purely state regulation, or (3) a federal court is asked to refrain from state criminal proceedings, nuisance actions antecedent to criminal proceedings or state suits to collect taxes, the court would not abstain. This Court, when considering the above factors, cannot find that it should abstain either.

Moreover, this Court finds the case which the defendant relies upon, United States v. Cargill, Inc., 508 F.Supp. 734 (D.Del. 1981), to be distinguishable. In Cargill, the EPA sued under the Clean Water Act to have a corporation enjoined from further violation of a wastewater discharge permit and to impose civil penalties for past violations. The defendant moved to have the court dismiss, abate or stay the action or to abstain from assuming jurisdiction over the action because of a still pending

suit filed by the State Department of Natural Resources and Environmental Control in the state court seeking identical relief. The district court found that the doctrine of abstention did apply. However, it did allow for a stay. The court, which gave several reasons for the stay, noted the most important reason to be that the federal action had caused the defendant to halt construction efforts to prevent water pollution, the principal goal of the Clean Water Act. Since the district court in Cargill found that the abstention did not apply, the case does not support defendant's position in arguing that this Court should abstain. Furthermore, in terms of granting a stay, this Court agrees with plaintiff that the most important reason for such a stay under Cargill, the prevention of pollution, would not be thwarted by this action, since the EPA seeks to augment and not disrupt defendant's fugitive dust control measures.

III.

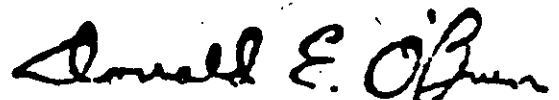
In arguing that the doctrines of issue and claim preclusion apply, defendant states that it had begun negotiations with the State prior to receiving any notice from the EPA and the consent order between the defendant and the State was only entered into after the EPA was given notice of an opportunity to request a public hearing or make a public comment. According to defendant, since the EPA had this chance to argue for compliance with its own regulations, the doctrines of issue and claim preclusion apply, and plaintiff is therefore barred from bringing this action,

which, if allowed, might unfairly lead to double penalties being imposed on defendant.

This Court finds defendant's argument to be similar to its argument concerning abstention in that it is another attempt to bar this federal action. As a result, many of the reasons given by the Court in rejecting defendant's argument for abstention are also applicable here. Again, this Court can find no statutory support for defendant's position in a statute that clearly contemplates enforcement on the federal level as well as the state level. This Court also finds the major cases defendant cites distinguishable from the case before us. In United States v. ITT Rayonier, Inc., where the Ninth Circuit Court of Appeals ruled that the EPA was barred under the doctrines of issue and claim preclusion from bringing an enforcement action pursuant to the Clean Water Act, the previous action ended with a decision rendered by a state supreme court. In the case before this Court, however, there was no previous state court action, but rather a consent decree issued by a state agency. Moreover, since no penalties were assessed by the state, defendant is not subject to double penalties.

IT IS THEREFORE ORDERED that defendant's motion for dismissal be denied.

December 10, 1984.



Donald E. O'Brien, Judge
UNITED STATES DISTRICT COURT

ATTACHEMENT II

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS

SEP 22 1983

CHARLES W. VAGNER

By *UC*

UNITED STATES OF AMERICA,
Plaintiff,

v.

EP-80-CA-265

CHEVRON U.S.A., INC.,
Defendant.

RECEIVED
SEP 23 1983
14:00

ORDER DENYING DEFENDANT'S MOTION TO DISMISS COMPLAINT

This is a civil action for injunctive relief and civil penalties pursuant to Section 113(b) of the Federal Clean Air Act, 42 U.S.C. § 7413(b). The suit was filed by Attorneys of the United States Department of Justice in the name of the United States of America as Plaintiff. Defendant now moves to dismiss the complaint, contending that only the Administrator of the Environmental Protection Agency is authorized by the statute to bring this action.

The language of Section 7413(b) literally provides that the Administrator shall commence a civil action for injunctive relief or civil penalties when the law or regulations have been violated. The Plaintiff contends that the United States, acting through its Department of Justice, and in cooperation with the Administrator of the Environmental Protection Agency, is also authorized to bring a civil action. The parties have cited only three cases dealing with this question, and they are divided in result. In United States v. Associated Electric Cooperatives, Inc., 503 F.Supp. 92 (E.D. Mo. 1980), the case

(2) (3)
relied upon by the Defendant, the court held that the statute did not empower the Attorney General to bring a civil action on behalf of or in the name of the United States. The other two cases, upon which the Plaintiff relies, held that the United States may bring an action under 42 U.S.C. § 7413(b). United States v. Packaging Corporation of America, No. G81-289 CA 7 (W.D. Mich. 1982) (unreported opinion); United States v. Texaco, 16 ERC 1142 (N.D. Ill. 1980).

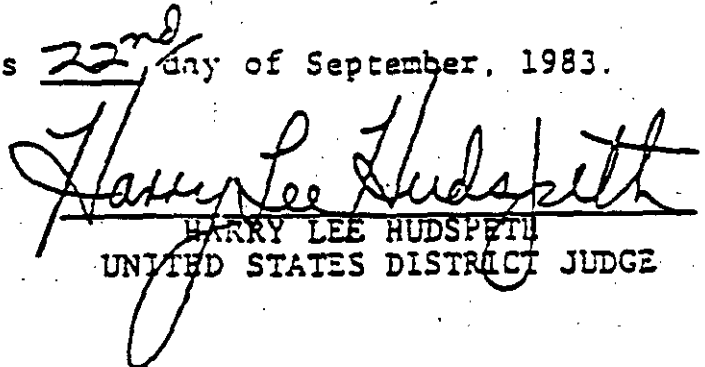
Section 7605 mandates that the Administrator of the Environmental Protection Agency and the Attorney General work together in the enforcement of the Clean Air Act. It appears to adopt and ratify a Memorandum of Understanding between the Attorney General and the Environmental Protection Agency, dated June 13, 1977, which provides in substance that the Department of Justice will control civil litigation brought to enforce the provisions of the Act. The Affidavit of Courtney Price, Special Counsel for Enforcement of the Environmental Protection Agency, establishes that the Administrator of the Environmental Protection Agency requested the Department of Justice to file the complaint in the instant case, and that the two agencies have cooperated at all stages of the proceeding. It is, therefore, unlikely that the interests of the Environmental Protection Agency will be compromised by any action taken by the Department of Justice, a fear expressed by the District Court in United States v. Associated Electrical Cooperatives, Inc., supra, at 94. Furthermore, the Defendant

has failed to show any prejudice arising from the filing of the suit in the name of the United States of America rather than the Administrator of the Environmental Protection Agency.

The United States is generally entitled to maintain action to effectuate its programs and policies even in the absence of specific statutory authority or pecuniary interest. In re Debs 158 U.S. 564, 586 (1894); United States v. LeMay, 322 F.2d 100, 103 (5th Cir. 1963); United States v. Arlington County, Va., 326 F.2d 929, 932 (4th Cir. 1964). Nothing in Section 7413(b) explicitly precludes the United States from bringing this suit in its own name to enforce the Clean Air Act. The Defendant's motion to dismiss the complaint should be denied.

It is therefore ORDERED that the Defendant's motion to dismiss the complaint in the above-styled and numbered cause be, and it is hereby, DENIED.

SIGNED AND ENTERED this 22nd day of September, 1983.


HARRY LEE HUDSPETH
UNITED STATES DISTRICT JUDGE